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Supreme Court, U.S.
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No. 03-1316

IN THE

Supreme Court of the United States

WILLIAM F. NEIL, JR.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT WYETH'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit properly denied mandamus to overturn the Judicial Panel on Multidistrict Litigation's routine transfer of Petitioner's federal court civil action under Section 1407 of Title 28 of the U.S. Code (the "Multi-District Litigation Statute").

PARTIES TO THE PROCEEDING BELOW

Respondent Wyeth incorporates by reference Petitioner's list of parties to the proceedings below. Petitioner named American Home Products Corporation ("AHP"), Wyeth-Ayerst Laboratories Company ("Wyeth-Ayerst"), and A.H. Robins Company ("Robins") as defendants in his civil action and as Respondents in this Court. On March 11, 2002, AHP changed its name to Wyeth. On August 3, 1998, Robins was merged into AHP and ceased to exist as a separate entity. On June 30, 2001, Wyeth-Ayerst merged with and into a wholly owned subsidiary of Wyeth.

STATEMENT PURSUANT TO RULE 29.6

Respondent Wyeth has no parent company, and no publicly held company owns more than 10% of Wyeth's stock.

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There is no good reason to grant the petition for certiorari in this case. Petitioner seeks to overturn an order of the Judicial Panel on Multidistrict Litigation (the "JPML") transferring his civil action against Wyeth from the Alabama federal court in which Petitioner filed the action to the federal court that has presided over a multi-district litigation proceeding for more than six years (the "MDL Court"). Petitioner sought in his complaint, among other things, a declaration that he was not barred from pursuing damage claims against Wyeth by a class action settlement agreement. He asked the Alabama federal court to enjoin the JPML's transfer of his action to the MDL Court, arguing that he had a constitutional right to collaterally attack that settlement in the Alabama court, although none of the authorities on which he relies supports that argument. The Alabama court refused to enjoin the transfer. Petitioner then made the same argument to the JPML, but it too rejected his argument, finding instead that Petitioner's collateral attack could be resolved most efficiently by the MDL Court. That transfer order is reviewable only by extraordinary writ, 28 U.S.C. § 1407(e), so Petitioner sought such a writ from the United States Court of Appeals for the Third Circuit. That court denied his petition without opinion.

The Petitioner now seeks certiorari based on an argument he concedes he never advanced before the Court of Appeals, namely that the Multi-District Litigation Statute should be interpreted to preclude the transfer of his case. This Court should decline to hear such a new argument. Because he never argued to the Court of Appeals that the JPML was acting outside of its authority, well-established principles would have made it inappropriate for the Court of Appeals to have granted such a writ, and well-established principles make it inappropriate for this Court to grant review in this case.

In any event, it would be inefficient for this Court to review the interlocutory order at issue here. The JPML's transfer was a routine and clearly correct exercise of its authority. Moreover, there is no conflict between the circuits relating to Petitioner's argument that he has a constitutional right to litigate his collateral attack in the federal court of his choosing. Indeed, there is no authority in any circuit upholding the existence of such a right.

Petitioner's arguments are clearly without merit and do not deserve this Court's attention.

OPINIONS BELOW

Respondent Wyeth incorporates by reference Petitioner's statement of opinions and judgments below.

STATEMENT OF JURISDICTION

The Judicial Panel on Multidistrict Litigation had jurisdiction to transfer Petitioner's civil action under 28 U.S.C. § 1407(a). The Court of Appeals for the Third Circuit had jurisdiction over the petition for mandamus under 28 U.S.C. § 1407(e). This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1407(a):

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any

district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(e):

No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. . . . Petitions for extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district.

U.S. Constitution, Article III, § 1:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

A. Background of the MDL Proceedings and of the Class Action Settlement

On December 10, 1997, the JPML established a multi-district litigation proceeding, MDL Docket No. 1203, in the United States District Court for the Eastern District of Pennsylvania (the "MDL Court"), to administer on a pretrial basis all actions pending in the federal courts claiming injury from the use of Wyeth's prescription diet drugs Pondimin or Redux (the "Diet Drugs"). *See In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 990 F. Supp. 834 (J.P.M.L. 1998) (amended order). The JPML determined that the cases raised common questions and that the transfer of such Diet Drug cases to one district for coordinated and consolidated pretrial proceedings under Section 1407 of Title 28 of the U.S. Code (the "Multi-District Litigation Statute") would be convenient for the parties involved and promote the just and efficient conduct of the litigation. *See id.* at 835-36. The MDL 1203 docket was assigned to the Honorable Louis C. Bechtle. *Id.* at 836. Since that time, the JPML has transferred thousands of diet drug actions to the MDL Court as "tag-along" cases from judicial districts throughout the nation.

In November 1999, after extensive litigation, Wyeth entered into a Nationwide Class Action Settlement Agreement (the "Settlement Agreement") with a class consisting primarily of all persons in the United States who had ingested the Diet Drugs. Wyeth agreed to pay up to $3.75 billion to resolve the claims of the almost six million class members. Judge Bechtle approved the Settlement Agreement on August 28, 2000, finding it to be fair, adequate, and reasonable.

See In re Diet Drugs Prods. Liab. Litig., MDL 1203, No. Civ.A. 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000) (order approving settlement).

Class Members had asserted claims for a wide variety of injuries allegedly arising from the use of the Diet Drugs, but there has never been any medical evidence to support such claims except with respect to two diseases, valvular heart disease ("VHD") and primary pulmonary hypertension ("PPH"). The Settlement Agreement provided extensive benefits relating to VHD, in light of the epidemiological evidence indicating there would be a large number of users of these drugs who might have that condition. PPH, however, is a very rare condition, although it is often fatal. While the Settlement Agreement compromised, settled and released all claims by Class Members, other than those who exercised an available opt-out right, the Settlement Agreement did not settle, compromise or release any claims based on PPH. Even if they did not opt out of the settlement class, Class Members were permitted to assert claims based on PPH. In order to identify Class Members who were entitled to assert such claims, the Settlement Agreement defined PPH. As the MDL Court found in approving the Settlement Agreement, based on the expert testimony at the fairness hearing, "the definition of PPH included in the Settlement Agreement is over-inclusive in that the Settlement Agreement definition allows a class member with an 'exceedingly mild case' of PPH to maintain an action against [Wyeth] on the basis of his or her PPH claim." *Id.* at *30.[1] Contrary to Petitioner's

1. Moreover, because PPH is a progressive condition which gets worse over time, the Settlement Agreement gave a benefit to PPH claimants by prohibiting Wyeth from asserting that the statute of limitations had begun to run on those claims before the claimant's condition met the Settlement Agreement's PPH definition. *Id.* at *31.

assertions, however, Class Members who opted out of the settlement class were free to assert any claim, including an alleged PPH claim not meeting that definition.

The MDL Court retained continuing and exclusive jurisdiction over the class action "to administer, supervise, interpret and enforce the Settlement in accordance with its terms." *Id.* at *72. That Court also entered an anti-suit injunction, barring Class Members who did not opt out of the class from asserting or prosecuting any claims barred by the Settlement Agreement. *See id.* at *71.

Judge Bechtle continued to oversee the Settlement Agreement and the multi-district litigation until June 2001, when he retired from the bench. He was succeeded by the Honorable Harvey J. Bartle, III.

B. Procedural History of Petitioner's Claims

Petitioner did not timely opt out of the settlement class. Nevertheless, on or about September 13, 2001, he filed a complaint against Wyeth (the "First Action") in the United States District Court for the Northern District of Alabama, alleging that, as a consequence of ingesting the Diet Drugs, he had developed "pulmonary hypertension."[2] On February 12, 2002, the JPML transferred that action to the MDL 1203 proceedings because the action involved common questions of fact with other cases in those proceedings. Petitioner had objected to transfer on the ground that his claims were allegedly not barred by the Settlement Agreement, which Wyeth disputed. The JPML observed that

2. Petitioner asserts that he filed his original complaint in the state court for Jefferson County, Alabama, *see* Pet. at 2, but that is not so.

the disagreement concerning whether Petitioner's claims would be precluded by the Settlement Agreement made his case "particularly appropriate for resolution by the transferee court." After Wyeth had requested Petitioner's medical records to determine whether Petitioner's claim was based on PPH as defined in the Settlement Agreement, and therefore not precluded thereby, Petitioner chose to dismiss his First Action without prejudice.

On January 13, 2003, Petitioner refiled his claims, again in the United States District Court for the Northern District of Alabama (the "Second Action"). *See* App. at 11-32. In the Second Action, Petitioner alleged that he had been diagnosed with "pulmonary hypertension and/or primary pulmonary hypertension" as a result of taking the Diet Drugs. Petitioner also expressly asserted that he was not bound by the Settlement Agreement because he had not received adequate notice; that the Settlement Agreement was not fair, reasonable, or adequate; and that he was not adequately represented in the negotiation of the Settlement Agreement. He requested a declaratory judgment that he was not bound by the Settlement Agreement, plus compensatory damages for his alleged pulmonary hypertension.

Petitioner then filed a motion with the District Court for the Northern District of Alabama to enjoin the JPML's transfer of the Second Action to the MDL 1203 proceedings, arguing that he had a constitutional right to litigate his collateral attack on the Settlement Agreement in that court, without regard to the Multi-District Litigation Statute. That motion was denied on June 23, 2003, without opinion. In addition, Petitioner filed with the JPML an objection to such a transfer, making there essentially the same argument. The JPML concluded, however, that the issues raised in the

Second Action were "particularly appropriate for resolution by the transferee court," App. at 4, denied Petitioner's motion and transferred the case to the MDL Court.

Petitioner then filed a petition for writ of mandamus with the United States Court of Appeals for the Third Circuit, pursuant to Section 1407(e) of Title 28, seeking to vacate the JPML's transfer order and return his case to the Northern District of Alabama. He argued that transfer was not "just" because it supposedly violated his right to collateral review in his own forum and that transfer was not "efficient" because the MDL Court could not properly decide his collateral attack. The Court of Appeals denied the mandamus petition without opinion.

Petitioner filed his petition for writ of certiorari seeking review of that denial of mandamus.[3]

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3. In that petition, Petitioner makes a number of statements concerning his medical condition and the diagnosis he has received. Pet. at 2. None of those statements is relevant to his petition, but in light of Supreme Court Rule 15.2, Wyeth points out that those statements are incorrect in the following respects. Petitioner states that he was examined by Dr. David Weill in February 2001, but the medical records available to Wyeth indicate that Petitioner was instead examined at that time by Dr. Oksana Senyk, a different pulmonologist. Petitioner states that Dr. Weill diagnosed him as having PPH, but Dr. Weill's letter, App. at 33-34, does not so state, referring instead to a prior diagnosis, apparently that of Dr. Senyk. *See* App. at 33. However, it appears from the medical records available to Wyeth that Dr. Senyk believed that Petitioner's pulmonary hypertension was caused by sleep apnea, which would mean he does not have PPH. In addition, while Dr. Weill states that sleep apnea symptoms developed after the Petitioner's pulmonary hypertension, the information currently available to Wyeth at least raises doubts about that factual sequence.

REASONS FOR DENYING THE PETITION

I. PETITIONER CONCEDES THAT HE NEVER ARGUED TO THE COURT OF APPEALS THAT THE JPML LACKED STATUTORY AUTHORITY TO TRANSFER HIS ACTION, AND HE MAY NOT NOW ADVANCE THAT ARGUMENT HERE

Petitioner concedes that he argues here for the first time that the Multi-District Litigation Statute does not authorize the transfer of a collateral attack on a class action settlement. Pet. at 5-6. To the JPML and to the Third Circuit Court of Appeals, Petitioner had only argued that it was an abuse of the JPML's discretion to transfer his action to the MDL Court in light of his alleged constitutional right to litigate his collateral attack in the federal court of his choosing. This Court should not consider this attempt to obtain review of the Court of Appeals' denial of mandamus on grounds never argued to that court. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).

Seeking to overcome that fatal defect in his petition, Petitioner argues that Supreme Court Rule 14.1(a), which he miscites as Rule 21.1(a), permits certiorari petitions to raise new issues not raised in the court below if those issues are fairly included in the question presented in the petition for certiorari. That rule provides that the question presented in a petition for certiorari is "deemed to comprise every subsidiary question fairly included therein." Petitioner's reading of that rule would open the door to every petitioner to bootstrap himself into new arguments never raised below, contrary to well-established policy. *See Pa. Dep't. of Corr.*, 524 U.S. at 212-213. The effect of the quoted language is

quite different, however: it merely provides that, if the petition is granted, the Court will consider arguments about subsidiary issues fairly included in the question on which certiorari was granted.

II. DENIAL OF MANDAMUS WAS APPROPRIATE BECAUSE PETITIONER FAILED TO DEMONSTRATE THAT THE JPML HAD EXCEEDED ITS AUTHORITY

Congress expressly proscribed review of JPML transfer orders except by extraordinary writ. 28 U.S.C. § 1407(e). Only exceptional circumstances rising to a judicial usurpation of power justify issuance of such a writ. *See, e.g., Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Such a writ has been traditionally used "to confine an inferior court to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (citations omitted). *See generally id.* at 26-31. The JPML has broad discretion in making transfer decisions, but mandamus may not be used to review such discretionary acts. A litigant seeking mandamus must demonstrate that he has a "clear and indisputable right" to the relief. *See Kerr*, 426 U.S. at 403. "Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)). The exercise of discretion "ought not to be overridden by a writ of mandamus." *Calvert Fire*, 437 U.S. at 665; *see also In re Ivy*, 901 F.2d 7, 10 (2d Cir. 1990) (denying mandamus to overturn a JPML transfer order and declining to determine jurisdictional issue as inappropriate on a petition for writ of mandamus).

The Court of Appeals here properly denied mandamus under these circumstances. Petitioner concedes that he did not argue to the Court of Appeals that the JPML had exceeded its statutory authority. He merely argued that the JPML had erred in determining, within its discretionary authority, that transfer would promote the just and efficient conduct of his action. But mandamus provides no remedy for any such error.

III. IT WOULD BE INEFFICIENT TO REVIEW AN INTERLOCUTORY ORDER DENYING MANDAMUS ON THE ISSUE OF WHICH FEDERAL COURT SHOULD HEAR THIS CASE

This Court should not use its limited resources to review at this stage of the litigation which federal court will hear and determine Petitioner's collateral attack on the Settlement Agreement. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory orders inappropriate for certiorari).

The transfer of Petitioner's Second Action did not deprive him of whatever right he has to litigate his due process arguments. If he is successful on those arguments in the MDL Court, he will be allowed to pursue his claims against Wyeth, and his action will ultimately be remanded for trial to the forum of his choice, the Northern District of Alabama. If he is unsuccessful in litigating his collateral attack on the Settlement Agreement, however, he will be entitled to appeal the dismissal of his action to the United States Court of Appeals for the Third Circuit and then to petition this Court for certiorari to review that determination, as well as the alleged impropriety of transfer.

By that time, the factual record on which Petitioner bases his arguments would have been fleshed out, unlike the present record consisting of little more than his own unsubstantiated allegations of such matters as his medical condition and when that condition was first manifested and how it has been diagnosed. And the Court of Appeals will have provided an opinion explaining its reasoning.

It would accordingly be inefficient for this Court to grant certiorari at the present time to review the interlocutory order denying mandamus solely concerning the transfer order.

IV. THERE ARE NO EXTRAORDINARY CIRCUMSTANCES HERE JUSTIFYING INTERLOCUTORY REVIEW BY THIS COURT

A. The JPML's Transfer Order Was a Routine Exercise of Its Powers

The JPML's transfer and the Court of Appeals' denial of mandamus were clearly correct and not such a departure "from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), as to warrant the exercise of this Court's supervisory power.

When common issues arise in actions filed in multiple judicial districts, the purposes of the Multi-District Litigation Statute are properly fulfilled by effecting a transfer to a single district court in order to provide for efficiency and consistency of resolution of those issues. *See In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 314 F.3d 99, 105 (3d Cir. 2002) (allowing collateral attacks in other courts would undermine Congress' purposes underlying 28 U.S.C. § 1407); *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d

1425, 1432 (2d Cir. 1993) (a right to collateral attack a class action settlement in the plaintiff's chosen forum does not overrule the Multi-District Litigation Statute, among other forum-shifting doctrines). The case law uniformly supports such transfers, and no circuit court has held that the JPML lacks statutory authority to effect such transfers or that such transfers violate due process rights. Indeed, the JPML has routinely transferred collateral attacks pending in the federal system to the district court overseeing the related multi-district litigation and class action settlement agreement. *See, e.g., In re Prudential*, 314 F.3d at 102 (collateral attacks transferred by JPML); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 254-56 (2d Cir. 2001) (collateral attacks transferred for pretrial purposes); *In re Antibiotic Drugs*, 320 F. Supp. 586, 590-91 (J.P.M.L. 1970) (collateral attacks should be transferred to avoid conflicting rulings). Nothing about this case departs from that accepted and usual course of proceedings.

B. The JPML's Transfer Decision Was Clearly Correct

The JPML correctly determined that the MDL Court was the most appropriate court to hear and determine Petitioner's collateral attack on the Settlement Agreement. *See* App. at 4. The MDL Court is the court most familiar, for example, with the complex medical evidence relating to PPH; the substantial difference between PPH and forms of pulmonary hypertension which are not PPH; the absence of any evidence of a causal connection between the Diet Drugs and forms of pulmonary hypertension not meeting the Settlement Agreement's PPH definitional criteria; and the background of the drafting of the Settlement Agreement's PPH definition to distinguish between true PPH and those other forms of pulmonary hypertension.

In addition, the MDL Court has heard and determined on prior occasions challenges to the adequacy of representation of Class Members claiming to have pulmonary hypertension that does not meet the Settlement Agreement's definition of PPH, the very issue raised in Petitioner's Second Action. The MDL Court rejected those arguments as without merit. *See, e.g.*, *In re Diet Drugs*, MDL 1203, No. Civ.A. 99-20593, U.S. Dist. LEXIS 20323, at *8-*11 (E.D. Pa. Oct. 8, 2002) (enjoining Class Members with pulmonary hypertension not meeting the Settlement Agreement's PPH definition from suing Wyeth and rejecting their argument that they had been inadequately represented); *In re Diet Drugs*, No. Civ.A. 99-20593, 2003 WL 22669132, at *1-*2 (E.D. Pa. Oct. 14, 2003) (rejecting a collateral attack brought by Class Members having pulmonary hypertension not meeting the Settlement Agreement's PPH definition). An appeal from that latter ruling is currently pending before the United States Court of Appeals for the Third Circuit.

Transfer of Petitioner's Second Action to the MDL Court accordingly serves the purposes of efficiency and consistency that underlie the Multi-District Litigation Statute.

V. PETITIONER'S STATUTORY AUTHORITY ARGUMENT, IN ANY EVENT, IS BASED ON A FAULTY PREMISE, BECAUSE PETITIONER'S CONSTITUTIONAL RIGHTS ARE IN NO WAY INFRINGED BY THE JPML'S TRANSFER

In an effort to elevate a routine transfer order into a supposed violation of constitutional rights, Petitioner argues that he has a constitutional right to litigate a collateral attack on the Settlement Agreement in whatever federal court he unilaterally chooses, without regard to the statutes governing the federal courts. No court has so held.

Implicit in Congress' constitutional authority to create and administer the lower federal courts, U.S. Const. art. III, § 1, is the authority to establish their respective jurisdictions and to establish mechanisms by which disputes in those courts can be resolved most efficiently. *See, e.g., Lockerty v. Phillips*, 319 U.S. 182, 187 (1943). The Multi-District Litigation Statute is a proper exercise of that power, designed to facilitate the just and efficient resolution of related disputes arising in different federal courts. The terms of the statute explicitly empower the JPML to transfer cases when it determines that doing so will serve "the convenience of the parties" and "the just and efficient conduct" of the action. 28 U.S.C. § 1407(a).

Petitioner claims, however, that the Multi-District Litigation Statute must be read to create an exception for his suit because, he says, an absent class member has the constitutional right to collaterally attack a class action judgment in the federal court of his choosing. But none of the authorities he cites can fairly be read to support the existence of such a right. *Phillips Petroleum Co. v. Shutts*, 492 U.S. 797 (1985), merely held that a state court judgment may bind an absent class member who had the right to opt out of the class, even if that party otherwise lacked minimum contacts with that state. *See id.* at 811-12. *Shutts* did not even address the forum in which a collateral attack could be made, much less the issue raised here concerning Congress' authorization of a transfer between two federal courts. The other cases cited by Petitioner similarly address the availability of collateral attacks under some circumstances, but not the forum in which those attacks may be brought. *See Hansberry v. Lee*, 311 U.S. 32 (1940) (collateral attack permitted when non-party sought to be bound by prior judgment despite inadequate representation); *Martin v. Wilks*,

490 U.S. 755 (1989) (right of non-party to a consent decree to sue for discrimination without being barred by decree).

Moreover, while Petitioner cites authority that a court may not pre-determine the res judicata effect of its own judgment, no authority cited supports the proposition that the same court that rendered a class action judgment could not *later* determine a collateral attack on that judgment in another case properly before that court. To the contrary, neither Judge Bartle nor Judge Bechtle would be disqualified from hearing Petitioner's collateral attack merely because they had previously participated in the case. *See United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Additionally, courts throughout the federal system are routinely tasked with reexamining their prior decisions, including motions for reconsideration and petitions for rehearing. Moreover, in this case, it is Judge Bartle who would hear Petitioner's collateral attack, not his predecessor Judge Bechtle, who had approved the Settlement Agreement.

There is also no merit in Petitioner's assertion that the MDL Court has no personal jurisdiction over him. First, the MDL Court has jurisdiction over Petitioner's Second Action because the federal court in which he filed that action had jurisdiction. The lower courts have consistently and correctly held that, after a transfer by the JPML, the transferee court has the same jurisdiction as the transferor court – in this case, the Northern District of Alabama where Petitioner initially filed suit. *See In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 n.11 (3d Cir. 2004) ("[T]he transferee court can exercise personal jurisdiction to the same extent that the transferor court could."); *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987). When Petitioner filed his action in a federal court, he "became subject to the

Federal Rules, including the procedural efficiencies administered by the Multidistrict Panel." *In re Regents of the Univ. of Cal.*, 964 F.2d 1128, 1135 (Fed. Cir. 1992). Petitioner has no legally protected interest in having his challenge heard by any particular federal court. *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 370 n.9 (4th Cir. 1967).

Second, because, contrary to his assertions, Petitioner had the right to opt out of the settlement class, the MDL Court obtained jurisdiction over him as a member of the class when he failed to exercise that right, under the principle established in *Shutts*. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), on which Petitioner relies, is inapposite. Unlike the non-opt-out class there, Class Members in the diet drug litigation, including Petitioner, were given the opportunity to opt out of the class. The MDL Court retained continuing jurisdiction to enforce the Settlement Agreement against Wyeth and Class Members such as Petitioner.

There is accordingly no merit to Petitioner's argument that the JPML's transfer somehow violated his rights, much less that he had a "clear and indisputable" right to the grant of mandamus to prevent a usurpation of power by the JPML. *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989).

VI. THE MERITS OF PETITIONER'S COLLATERAL ATTACK WERE NOT BEFORE THE COURT OF APPEALS AND ARE NOT BEFORE THIS COURT

Petitioner spends the majority of his Petition addressing arguments that are wholly irrelevant to the issue that was before the Court of Appeals and that is now presented to this Court. The only issue before the Court of Appeals was whether the JPML properly transferred Petitioner's civil action to the MDL Court. It is also the only issue properly presented to this Court in the petition for writ of certiorari. The availability of collateral review in general, *see* Pet. at 7-11, and the merits of Petitioner's collateral attack, *see* Pet. at 13-20, were not, and could not have been, decided by the JPML and were not before the Court of Appeals. *See In re Ivy*, 901 F.2d at 9 (JPML cannot decide merits of case, so not before circuit court in petition for writ of mandamus under Section 1407(e) of Title 28). The JPML only determined that transfer of Petitioner's collateral attack was proper under the Multi-District Litigation Statute.

Nevertheless, Petitioner misstates an important fact in his argument about the merits of his collateral attack which merits correction under Supreme Court Rule 15.2. Contrary to Petitioner's repeated assertions, Pet. at 3, 15, 16, 17, all Class Members were permitted to exclude themselves from the class, including Class Members claiming PPH. *See In re Diet Drugs*, 2000 WL 1222042, at *25. All Class Members who requested exclusion preserved their right to bring separate actions against Wyeth, including claims allegedly based on PPH, whether or not they met the Settlement Agreement's PPH definition. *See id.* Petitioner did not, however, exercise his right to opt out of the class. Notice of the proposed class certification and settlement,

moreover, was distributed in one of the most extensive notice programs in the history of class action litigation. That program utilized multiple and repeating advertisements on radio and television and in magazines and newspapers, a well-publicized toll-free telephone number to call to obtain a mailed notice package, a website posting copies of the key documents, and other forms of communication. That program was designed to alert former Diet Drug users of the VHD and PPH risks associated with those drugs, which had previously been withdrawn from the market; the massive litigation which had followed that withdrawal; the terms of the proposed Settlement Agreement, including benefits available even to those without any known injuries; the Settlement Agreement's treatment of PPH claims and its definition of PPH; and the opportunity to opt out from or object to the proposed class certification and settlement. *See In re Diet Drugs*, 2000 WL 1222042, at *35-*38.

CONCLUSION

The petition raises no question worthy of certiorari and should be denied.

Respectfully submitted,

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